

REMARKS

The disclosure is objected to and the claim stands rejected pursuant to 37 C.F.R. §1.121(e) and under 35 U.S.C. §112, first and second paragraphs. Applicant believes that the amendments made to the specification specifically address the Examiner's objections detailed in Paragraphs A-B on page 2 of the Office Action. Withdrawal of the objection and reconsideration of the rejection under 35 U.S.C. §112, first and second paragraphs, is respectfully requested.

Claim 1 stands rejected under 35 U.S.C. §102(b) for asserted anticipation based on Canadian Plant Breeder's Right Application No. 97-998, published on April 30, 1997, in view of Applicant's previous admission that 'Cabot' was first publicly available in Canada after June 2, 1998.

The Examiner admits at page 4 of the Office Action that the cited publication standing alone is non-enabling. Additionally, it does not indicate what would constitute a public use or sale of 'Cabot' in the United States or abroad more than one year before the filing date of the instant application. According to new information provided to the Undersigned by the Applicant, the instant variety was not on sale or publicly available more than one year prior to February 11, 2002, the filing date of the parent application for 'Cabot'. Instead, the variety was only distributed to growers who acquire extremely small quantities of newly developed varieties for testing and trialing purposes on their farms. The testing and trialing period takes several years before a grower would even begin to decide whether to commercialize the variety. This is especially true for 'Cabot' due to its slow-running trait. Further, 'Cabot' was not even listed on the invoices to the growers under its varietal denomination. Instead, it was listed as ST-CAB (please see the attached invoices). Additionally, please see attached one example of a representative Testing Agreement used in these distributions for 'Cabot'. Thus, the distributions to the growers were obscure occurrences for testing and trialing purposes only that would go unnoticed by those skilled in the art.

In view of the above, because the new variety was never disclosed in an enabling publication, it was not publicly available anywhere more than one year before the effective filing date of the present application, and it was only available for testing and

Application No. 10/755,842
Paper Dated: November 14, 2005
In Reply to USPTO Correspondence of July 13, 2005
Attorney Docket No. 3139-040120

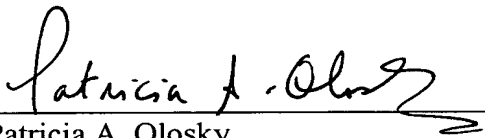
trialing purposes, the rejection under 35 U.S.C. §102(b) is wholly inappropriate. Withdrawal of the rejection under 35 U.S.C. §102(b) is respectfully requested.

CONCLUSION

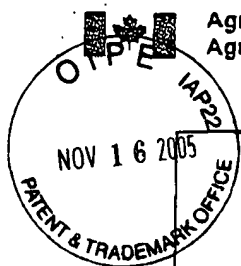
In light of the foregoing, allowance of the claim is respectfully requested.

Respectfully submitted,

THE WEBB LAW FIRM

By 

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Agriculture and Agri-Food Canada Agriculture et Agroalimentaire Canada

**Agreement for Testing New Fruit Varieties Developed at the
Atlantic Food and Horticulture Research Centre,
Agriculture and Agri-Food Canada, Kentville, Nova Scotia, Canada**

Recipient/Cooperator: (name/organization) Dr. David Wildung

(address) U. of Minnesota, North Central Exp. Station, Grand Rapids MN

Crop and Varieties: Strawberry: 'Cabot', 'Sable', 'Brunswick', 'Evangeline', K93-20

The Atlantic Food and Horticulture Research Centre (AFHRC) appreciates your desire to test the new fruit cultivars or numbered selections specified above. To safeguard our commercial interests the material is supplied subject to the following conditions:

1. The plants and all propagated material remain the property of AFHRC and are for experimental use only. They will not be sold, given away, or otherwise distributed. They will be destroyed if so requested by AFHRC.
2. Propagation is prohibited. Permission for propagation must be obtained in writing from the Director of AFHRC.
3. Any mutant, variant, or sport must be reported to AFHRC and remains the property of AFHRC.
4. AFHRC is not held liable for any loss which may arise from such plantings or experiments.
5. The results of experiments or trials and any reports relating to the material will be made available to AFHRC.
6. The Cooperator will restrict the general public from access to the trial.

Please complete and sign this form, copy for your records, and return original to: Dr. A.R. Jamieson, Agriculture and Agri-Food Canada, Atlantic Food and Horticulture Research Centre, 32 Main Street, Kentville, Nova Scotia B4N 1J5

The acts of the AFHRC and the Cooperator in signing this Agreement and the Cooperator receiving the specified Varieties shipped in view of this assigned Agreement, are intended by the parties to create a legally binding contract.

FOR COOPERATOR:

By: Dr. David K. Wildung

David K. Wildung

(type or print name)

Date: 5/7/99

FOR AGRICULTURE AND AGRI-FOOD CANADA:

AR Jamieson

Andrew R. Jamieson

(type or print name)

15 July 1999

Canada

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JUST A

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DATE

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SAME

C. O. KEDDY NURSERY INC.
962 North Bishop Road
Kentville, Nova Scotia
Canada B4N 3V7
(902) 578-4497

Just Another Farm
Hunter River
PEI
CQA 1W0

Shipper Thompson's

Terms -Net 30 days
P.O. #

ST-B00	2000	ea	Budmity Strawberry Plants	144.00	144.00
ST-SPA	2000	ea	Sparkle Strawberry Plants	85.00	85.00
ST-CAB	1000	ea	Cabot Strawberry Plant	10.00	10.00
ROY-CAB	5	ea	Royalty on Cabot Strawberry	2.00	10.00
BL-HAR	5	ea	New Hardy Blackberry	7.00	14.00
BLUE 4	2	ea	Bluebella Blueberry	7.00	14.00
BL-1	2	ea	Blue Crop	7.00	14.00
BLUE 5	2	ea	Jersey Blueberry	7.00	14.00
Interest charged at 2 % per month					
H S T # 882273188 RT					
Net amount				435.00	
Shipping				31.50	
G S T				32.66	
H S T					
TOTAL					499.16

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C. D. KEDDY NURSERY INC
9832 North Bishop Road
Kentville, Nova Scotia
Canada B4N 3V7
(902) 678-4497

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SECRET

026-175-022

DATE _____

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Gary Mood**Salmon River Farms
R.R.# 1, Box 2981 *
Yaracouath,
N.S.
BSA 4A5

SAME

Shipper

How's

Terms - Net 30 days
P.O. #

P.O. #

ST-ITEM	QUANTITY	UNIT	DESCRIPTION	UNIT PRICE	AMOUNT
ST-KENT	6500	ea	Kent Strawberry Plant	.075	637.50
ST-CAB	2000	ea	Cabot Strawberry Plant	.09	180.00
ST-HON	4000	ea	Honeoye Strawberry Plants	.075	300.00
ST-JEW	7500	ea	Jewel Strawberry Plants	.075	562.50
ROY-CAB	2	ea	Royalty on Cabot Strawberry	10.00	20.00
ROY-JEW	7.50ea		Royalty on Jewel	15.00	112.50
DUES	22	/a	Hort. N.S. Dues	5.00	110.00
RA-BDY	100	ea	Boyne Raspberry Canes	.45	45.00
BLUE 13	10	ea	Polaris Blueberry	7.00	70.00
BLUE 10	15	ea	Chippewa Blueberry	7.00	105.00
Interest charged at 2 % per month					2,142.50
H S T # 982273188 RT					50.00
					328.00
TOTAL					\$2,261.30

DATE	DESCRIPTION	AMOUNT	CHECK NO.	DEBIT	CREDIT	BALANCE
12-31-50	ROYALTY	10.00				10.00
1-31-51	ROYALTY	10.00				20.00
2-28-51	ROYALTY	10.00				30.00
3-31-51	ROYALTY	10.00				40.00
4-30-51	ROYALTY	10.00				50.00
5-31-51	ROYALTY	10.00				60.00
6-30-51	ROYALTY	10.00				70.00
7-31-51	ROYALTY	10.00				80.00
8-31-51	ROYALTY	10.00				90.00
9-30-51	ROYALTY	10.00				100.00
10-31-51	ROYALTY	10.00				110.00
11-30-51	ROYALTY	10.00				120.00
12-31-51	ROYALTY	10.00				130.00
1-31-52	ROYALTY	10.00				140.00
2-28-52	ROYALTY	10.00				150.00
3-31-52	ROYALTY	10.00				160.00
4-30-52	ROYALTY	10.00				170.00
5-31-52	ROYALTY	10.00				180.00
6-30-52	ROYALTY	10.00				190.00
7-31-52	ROYALTY	10.00				200.00
8-31-52	ROYALTY	10.00				210.00
9-30-52	ROYALTY	10.00				220.00
10-31-52	ROYALTY	10.00				230.00
11-30-52	ROYALTY	10.00				240.00
12-31-52	ROYALTY	10.00				250.00
1-31-53	ROYALTY	10.00				260.00
2-28-53	ROYALTY	10.00				270.00
3-31-53	ROYALTY	10.00				280.00
4-30-53	ROYALTY	10.00				290.00
5-31-53	ROYALTY	10.00				300.00
6-30-53	ROYALTY	10.00				310.00
7-31-53	ROYALTY	10.00				320.00
8-31-53	ROYALTY	10.00				330.00
9-30-53	ROYALTY	10.00				340.00
10-31-53	ROYALTY	10.00				350.00
11-30-53	ROYALTY	10.00				360.00
12-31-53	ROYALTY	10.00				370.00
1-31-54	ROYALTY	10.00				380.00
2-28-54	ROYALTY	10.00				390.00
3-31-54	ROYALTY	10.00				400.00
4-30-54	ROYALTY	10.00				410.00
5-31-54	ROYALTY	10.00				420.00
6-30-54	ROYALTY	10.00				430.00
7-31-54	ROYALTY	10.00				440.00
8-31-54	ROYALTY	10.00				450.00
9-30-54	ROYALTY	10.00				460.00
10-31-54	ROYALTY	10.00				470.00
11-30-54	ROYALTY	10.00				480.00
12-31-54	ROYALTY	10.00				490.00
1-31-55	ROYALTY	10.00				500.00
2-28-55	ROYALTY	10.00				510.00
3-31-55	ROYALTY	10.00				520.00
4-30-55	ROYALTY	10.00				530.00
5-31-55	ROYALTY	10.00				540.00
6-30-55	ROYALTY	10.00				550.00
7-31-55	ROYALTY	10.00				560.00
8-31-55	ROYALTY	10.00				570.00
9-30-55	ROYALTY	10.00				580.00
10-31-55	ROYALTY	10.00				590.00
11-30-55	ROYALTY	10.00				600.00

INVOICE

C. D. KEDDY NURSERY INC.
 962 North Bishop Road
 Kentville, Nova Scotia
 Canada B4N 3V7
 (902) 678-4497

BUTT G

DATE

06-03-00

PAGE

Gorden Butterworth Farms Ltd,
 Site 1 Box 19,
 Marshland,
 Nfld
 AOB 3KO

SAME

Shipper Day & Ross

Terms - 30 Days
 P.O. #

COMMENTS	QUANTITY	UNIT PRICE	TOTAL
Interest charged at 2% per month			
M S T # 002273188 RT			
Net amount			1,217.50
Shipping			151.00
G S T			206.78
TOTAL			\$1,585.28

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